

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

RALPH H. DRAKE, JR.,

Chapter 7

Debtor.

Case No.: 01-14993

JOHN W. TABNER, WILLIAM F. RYAN, JR.,
and WILLIAM J. KENIRY, d/b/a TABNER,
RYAN & KENIRY,

Plaintiff,

Adv. Pro. No.: 02-90054

v.

RALPH H. DRAKE, JR.,

Defendant.

WILLIAM M. McCARTHY, as Chapter 7
Trustee to the bankruptcy estate of RALPH
H. DRAKE, JR.,

Plaintiff,

Adv. Pro. No.: 02-90281

v.

RALPH H. DRAKE, JR.,

Defendant.

APPEARANCES:

Stephen J. Waite, Esq.
Attorney for the Debtor/Defendant
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Albany, NY 12207

Segel, Goldman, Mazzotta & Siegel, P.C.
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Howard M. Daffner, Esq.

Christian H. Dribusch, Esq.
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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Joint Memorandum-Decision and Order

Before the court are the consolidated adversary proceedings instituted by Tabner, Ryan and Keniry ("Tabner") and the Chapter 7 trustee, William M. McCarthy, Esq. ("Trustee"). The Plaintiffs, having filed original and amended complaints, jointly assert three statutory predicates for the denial of Debtor's discharge: 11 U.S.C. §§ 727(a)(2) (transfer of property with intent to hinder, delay, or defraud), 727(a)(3) (failure to keep or preserve books and records), and 727(a)(4) (false oaths and accounts). As a fourth and final cause of action, the Trustee independently asserts that the denial of discharge is equally warranted pursuant to 11 U.S.C. § 727(a)(5) (failure to account for loss of assets).¹ The Court held a joint trial of the adversary proceedings on February 11, 2003, which was continued and concluded on March 26, 2003.

Jurisdiction

The matters before the court are core proceedings pursuant to 28 U.S.C. §§ 157(b)(2)(A) and 157(b)(2)(J). The court has jurisdiction over the consolidated core proceedings pursuant to 28 U.S.C. § 1334(b).

Facts

In each of the adversary proceedings, the parties filed stipulations of fact on February 6, 2003. The following findings of the court are based on the stipulations, pleadings, trial testimony of the Debtor and the Debtor's accountant, and the exhibits² admitted at trial.

The Debtor filed a voluntary Chapter 7 petition ("Petition") on August 3, 2001, which was received by the Bankruptcy Court Clerk's office at 3:37 p.m.³ The Petition included a signed declaration, whereby the Debtor affirmed that the Petition was truthful and accurate. On the date of filing, the Debtor and his counsel,

¹ On February 21, 2003, following the first day of the adjourned trial, Plaintiffs filed amended complaints objecting to discharge in order to procedurally supplement allegations within the originally pled causes of action. The Debtor did not file answers to the amended complaints.

² The exhibits were marked as Defendant's Exhibit 1-4, Creditor's Exhibit 1-9, and Trustee's Exhibit A-M.

³ The court notes the temporal significance as it relates to Tabner's 11 U.S.C. § 727(a)(2)(B) cause of action, which alleges that the Debtor transferred real property after the bankruptcy filing. In support of this claim, Tabner relies upon the recording of a deed by the Albany County Clerk's office on August, 3, 2001 at 3:43 p.m. The court will fully address the merits of Tabner's claim *infra*.

Stephen J. Waite, signed the Petition where required. At trial, the Debtor testified that counsel's office, due to time constraints, had supplied him with blank forms to prepare. The Debtor then completed the Petition at home within a twenty-four hour period and returned it to counsel's office for Attorney Waite's signature and immediate filing.

The Debtor subsequently moved by *ex parte* application to convert the Chapter 7 case to one under Chapter 13 of the Bankruptcy Code, and the court approved the application by Order dated September 20, 2001. The Debtor testified that his bankruptcy filing was motivated by the scheduling of an imminent foreclosure sale by Ocwen Bank, mortgagee on the Debtor's commercial property known as 19 Computer Drive, Albany, New York and his principal residence known as 3 Drake Court, Albany, New York (the "Residence"). It was the Debtor's intention to file for reorganization; however, without the benefit of counsel's review,⁴ he inadvertently filed for Chapter 7 relief rather than Chapter 13.⁵ During the pendency of the Chapter 13 case, the Chapter 13 trustee moved to dismiss the case pursuant to 11 U.S.C. § 1307(c). In response, the Debtor sought to convert the case from Chapter 13 to Chapter 11, but met with opposition from creditors and the United States trustee. Over the opposition of counsel, the Debtor's motion to convert was denied by Order dated November 13, 2001. Upon consent, the case was reconverted from Chapter 13 back to Chapter 7 by Order dated November 26, 2001. William M. McCarthy was reappointed as the interim Chapter 7 trustee.

Following the closure of the § 341 meeting of creditors, the Trustee requested that amended

⁴ Although Attorney Wait signed the Petition where required, the Debtor and counsel acknowledge that counsel did not review the Petition before filing. While the court does have authority to levy a sanction against Debtor's counsel, the court will not do so in this case. Practitioners, however, must be mindful of Fed. R. Bankr. P. 9011, requiring that an attorney certify to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the factual contentions contained in a debtor's petition have or are likely to have evidentiary support. *See* Fed. R. Bankr. P. 9011(b).

⁵ The Debtor's intent was evidenced on the face of the Petition. The Debtor initially marked the Chapter 11 small business box on page 1 of the Petition and also included three parcels of real estate under both sections (a) (Property to be Surrendered), and (b) (Property to be Retained) of his Statement of Intention, adding a notation under section (b) that the debt for one commercial property would be "modified."

schedules be filed to correct the discrepancies between the Petition and the Debtor's § 341 hearing testimony. Although the Debtor indicated that amended schedules and statements would be filed (Def.'s Ex. 1), he did not amend the Petition in this proceeding. (Tr. Stip. para. 5.)

The Debtor identified Tabner on his Schedule F (Creditors Holding Unsecured Nonpriority Claims) as an unsecured creditor with a claim in the amount of \$50,000. Admittedly, Tabner is a judgment creditor of the Debtor by virtue of a judgment entered on July 17, 2000 in the Supreme Court of the State of New York, Albany County, in the amount of \$58,876.69. The judgment is currently on appeal to the New York State Supreme Court, Appellate Division, Third Department. (Tabner Stip. para. 2.)

The Debtor attended Siena College and obtained an Associate's Degree in accounting in 1969 from Russell Sage College. From 1969 to 1976, he was employed by the New York State Department of Taxation and Finance ("New York State") as a sales tax auditor and, in the latter years, as a senior sales tax auditor. The Debtor was initially responsible for auditing companies to ensure that they were collecting and remitting the correct amount of sales tax. Once he obtained the title of senior sales tax auditor, he was also responsible for the supervision and oversight of field auditors.

During his employment with New York State and throughout the mid-1970's, the Debtor was a co-owner of the Albany semi-pro football team known as the Metro Mailers.⁶ The Debtor's cessation of employment with New York State, whether voluntary or involuntary, coincided with the Metro Mailers business venture. When asked to explain the circumstances that ended his employment with New York State, he testified that he "resigned and went into the construction business." (Tr. 2/11/03 at 59.) When asked whether he was ever suspended from New York State, he answered affirmatively and explained that his suspension resulted from allegations of money laundering by the Metro Mailers. The Debtor further testified that he was the subject of an internal investigation conducted prior to his resignation by the New York State

⁶ The circumstances leading to the Debtor's resignation or termination from New York State are unknown. As discussed *infra*, Tabner's counsel questioned the Debtor extensively about his final year of employment with New York State in an effort to open the door for the introduction of a criminal proceeding precipitated by the Debtor's conduct while he was a New York State employee. The Debtor, however, did not provide any unequivocal responses.

Internal Affairs Department and the Internal Revenue Service Fraud Division. Later, Tabner's counsel introduced a criminal proceeding against the Debtor⁷ that charged him with grand larceny for allegedly submitting an inaccurate voucher to New York State in 1976 for jury duty that he never actually served. The Debtor then alluded that his alleged criminal conduct may have caused his suspension from New York State. Consequently, the record remains unclear as to how the Debtor's employment with New York State ended. The court will address the admissibility of the criminal proceeding *infra*?⁸

Following his employment with New York State, the Debtor entered into the construction business as the sole owner and operator of RHD Construction Corp. ("RHD"), an excavation business that existed until approximately 1999. As President of RHD, the Debtor had a substantial line of credit in excess of \$500,000 with Home and City Savings Bank's⁹ commercial branch. Additionally, for a minimum of one to two years, RHD reported gross annual revenue in excess of \$2,000,000. The Debtor indicated that he had been involved in approximately 500 construction and real estate contracts as of 1998, including: (1) Magnolia Circle, an 80 lot subdivision in Ravena, New York; (2) Dutch Brook, a 45 lot subdivision in Guilderland, New York; (3) Mercy Court, an eight-unit rental property in Albany, New York; and (4) 486 Sand Creek Road, the commercial offices of RHD in Albany, New York. Between 1976 and 1998, the Debtor also worked extensively on the Corporate Woods commercial park in Albany, New York.

During his operation of RHD, the Debtor became a one-half partner in the Woodfield Development Corporation ("Woodfield"), a corporation responsible for the development of a 12 acre commercial and residential parcel on Route 9 in Malta, New York. The Debtor obtained construction financing for the Woodfield project by securing mortgages totaling approximately \$ 1,000,000. This amount included an initial mortgage to the seller in the amount of \$250,000, plus subsequent private loans advanced to the Debtor by

⁷ *People v. Drake*, 92 A.D. 2d 1011 (N.Y. App. Div. 3d Dep't 1983), *aff'd mem.*, 61 N.Y. 2d 359 (N.Y. App. Div. 3d Dep't 1984).

⁸ *See* Discussion *infra* Part A. At the request of the court, the Debtor and Tabner filed post-trial memorandums of law, and the Debtor filed a reply memorandum limited to the admissibility of the criminal proceeding.

⁹ The Debtor testified that Home and City Savings Bank is now known as Trustco Bank.

Edward Cammarota ("Cammarota"). In return, Cammarota was given a mortgage on the Woodfield property. The Woodfield project was eventually sold to Paulsen Development Company in 1996 for \$1,419,600.¹⁰

Although the Debtor ceased operation of RHD in 1999, he continued in the construction business as an employee of Ashland Construction Company, Inc. ("Ashland"), a corporation solely owned by his wife, Elizabeth Drake. The Debtor testified that Ashland provided him with the use of a vehicle and access to the corporate bank accounts for purposes of personal check drafting. He did not indicate when, if at all, he ceased employment with Ashland.

The Debtor was also professionally affiliated with his sister and brother-in-law, Carol Ann Goodwin and William T. Goodwin, as a partner in the Goodwin Village Partnership (the "Partnership"). The Partnership maintained two four-unit rental units in Guilderland, New York. The Debtor was instrumental in the formation of the Partnership, having solicited the Goodwin's financial assistance in 1989 in exchange for a 50% Partnership stake.

As a businessman and entrepreneur for approximately three decades, the Debtor was exposed to a plethora of litigation. The adverse parties included a private landowner with whom he had contracted to purchase and develop property, private and commercial mortgagees, and business associates. At the time of filing, the Debtor was a party to pending lawsuits commenced by Cammarota for breach of contract and Tabner for the nonpayment of services.

The Debtor's self-proclaimed financial "nightmare" (Tr. 3/26/03 at 75) culminated in his bankruptcy filing before this court. Because of the magnitude of the allegations in the underlying adversary proceedings, an exhaustive review of the Petition is both warranted and unavoidable.

On his Schedule A (Real Property), the Debtor indicates that the Residence is held as a tenancy by the entirety and has a market value of \$130,000, with a secured lien in the amount of \$110,000. However, during direct examination by Trustee's counsel, the Debtor acknowledged that he was the fee simple owner, as evidenced by the May 20, 1983 warranty deed by and between the Estate of Christina Leitch and Ralph

¹⁰ The Debtor testified that there were 52 building lots that each sold for \$27,300.

H. Drake, recorded in the Albany County Clerk's office on May 20, 1983 in Book 2239 of Deeds at page 1005. (Tr. Ex. G.) Contrary to the value disclosed in the Petition, the Debtor produced a 2002 general tax bill from the Town of Colonie for the Residence indicating a full market value assessment of \$156,000. (Tr. Ex. J.)

The Debtor lists two additional parcels of real property on his Schedule A: 19 Computer Drive, Albany, New York and Route 9W, Towns of Coeymans and New Baltimore. He does not list any other ownership interests in real property. In response to the Statement of Financial Affairs' question 5, asking the Debtor to list all property that has been sold at a foreclosure sale or transferred through a deed in lieu within one year immediately preceding the commencement of the bankruptcy case, the Debtor answers "None." (Cr. Ex. 1; Tr. Ex. A.) During direct examination, however, the Debtor revealed that he had transferred real property known as 14 and 16 Fuller Road, Albany, New York, to Theresa Drake, the Debtor's mother, within three months of the bankruptcy filing (the "Fuller Road Transfer"). The Debtor indicated that the July 21, 2000 deed (the "Drake Deed") effectuating the transfer was given to Theresa Drake as a deed in lieu of foreclosure after he failed to make payments on an outstanding note and mortgage (the "Mortgage") held by Theresa Drake in the amount of \$120,000. The Debtor personally delivered the Drake Deed for recording to the Albany County Clerk's office on the date of his bankruptcy filing, August 3, 2001. The Drake Deed bears a date stamp of "2001 Aug-31 P 3:43" and a transfer tax stamp indicating that no consideration was paid to the Debtor for this transfer. (Cr. Ex. 3.)

At trial, the Debtor stated that his motivation for the Fuller Road Transfer was "to try to make things right" (Tr. 3/26/03 at 114.) He testified that he had never made any payments on the February 11, 2000 Mortgage," which was recorded in the Albany County Clerk's office on March 7, 2000 in Book 3818 of Mortgages at page 1031 (Cr. Ex. 2), and that his mother had paid the property taxes on the subject property for a number of years. The parties stipulated that the Debtor did not include the property, prior ownership,

¹¹ Although the Mortgage identifies the property as "13 Fuller Road, Albany, New York 12205," the Debtor's testimony established that the description was in error and that the Mortgage should have read 14 and 16 Fuller Road.

the Mortgage, or the transfer of the mortgaged premises on his Schedules or Statement of Financial Affairs. (Tabner Stip. para. 14.) The parties also stipulated that Theresa Drake is not listed on the Debtor's Schedule D as a secured creditor and that the debt to Theresa Drake is not listed on Schedule F. (Tabner Stip. Paras. 12-13.)

When questioned about the consideration for the Mortgage, the Debtor maintained that Theresa Drake had satisfied a prior mortgage on the property and that he had borrowed additional monies from his mother over a period of approximately ten years, beginning in 1990. Accordingly, the Debtor produced numerous checks written by Theresa Drake and made payable to him between March 1996 and June 2001. (Tr. Ex. E.) Several of those checks, totaling \$37,720, post-dated the Mortgage. When asked about the circumstances under which he signed the Mortgage, the Debtor indicated that he wished to repay the outstanding indebtedness in order to restore family harmony.

Similarly, the Petition is silent regarding the interfamily transfer of commercial property known as 486 Sand Creek Road, Albany, New York. In response to question 10 of the Statement of Financial Affairs, asking the Debtor to list all property transferred within one year immediately preceding the commencement of the case, the Debtor marked "None." (Cr. Ex. 1; Tr. Ex. A.) The Debtor acquired 486 Sand Creek Road by deed from Robert C. Miller dated July 29, 1982, recorded in the Albany County Clerk's office on March 6, 1984 in Book 2256 of Deeds at page 1001. (Tabner Stip. para. 16.) The Debtor transferred 486 Sand Creek Road to Carol Ann Goodwin and William T. Goodwin by deed (the "Goodwin Deed") dated July 21, 2000, recorded in the Albany County Clerk's office on August 14, 2000 in Book 2662 of Deeds at page 378 (the "Sand Creek Road Transfer"). (Cr. Ex. 4; Tabner Stip. para. 17.) The recorded Goodwin Deed states that the Debtor did not pay transfer tax to Albany County. The Petition neither lists the transfer as being within one year of filing nor that William T. Goodwin and Carol Ann Goodwin are creditors of the bankruptcy estate.

In a prior deposition conducted September 7, 2000,¹² the Debtor stated that the Sand Creek Road property was also transferred by deed in lieu of foreclosure, following Mr. Goodwin's commencement of

¹² The deposition was conducted within the ambit of *John W. Tabner, William P. Ryan, Jr., and William J. Keniry, d/b/a Tabner, Ryan and Keniry v. Ralph Drake, Jr. and RHD Construction Corp.*, Albany County Supreme Court, Index No.: 423-98. The deposition transcript was admitted into evidence as Defendant's Exhibit 4.

a foreclosure action. According to the Debtor, his brother-in-law initiated the foreclosure action after he failed to make principal or interest payments on an underlying mortgage for a period of four to five years and also could not pay the property taxes. He elaborated at trial by stating that the Goodwins had satisfied the Debtor's prior mortgage and thereby terminated a foreclosure action commenced by Union National Bank against him in 1993 or 1994. In return, the Debtor mortgaged the property to the Goodwins, who subsequently foreclosed on their mortgage in 2000.

As previously discussed, the Debtor's business relationship with the Goodwins extends beyond that of mortgagor/mortgagee. The Debtor built two apartment buildings using construction financing prior to 1988; when it appeared that he could not obtain permanent financing, he summoned the Goodwins to form the Partnership. On May 19, 1989, the Debtor, William T. Goodwin, and Carol Ann Goodwin signed a Business Certificate of Partners with respect to the Partnership, which was filed with the Albany County Clerk's office on May 22, 1989. (Cr. Ex. 5.) By warranty deeds¹³ dated August 28, 1992, recorded in the Albany County Clerk's office on August 31, 1992 in Book 2466 of Deeds at pages 798 and 800, the Debtor transferred real property on behalf of the Partnership to William T. Goodwin and Carol Ann Goodwin in their individual capacities.¹⁴ The Debtor's accountant, Steven J. Lubbe, testified that he had mistakenly carried the real estate as an asset of the Partnership through 2001 since the partners had failed to advise him that the property had been transferred nearly a decade earlier. Mr. Lubbe could not recall whether the Debtor had been compensated for his initial investment in the property or whether any consideration had been paid for the transfer. Fearful of opening the statute of limitations on the closed returns, the partners decided not to amend the incorrect returns. Although the property ceased to be a Partnership asset, the Debtor continued to hold a 50% ownership interest in the Partnership that was not listed under paragraph 12 of Schedule B. While the Debtor testified that the Partnership had been discontinued in 2000-2001, the partners have not

¹³ The Debtor described the property as one parcel that is accessible by two streets; therefore, two deeds were executed and recorded in the Albany County Clerk's office relating to the transaction.

¹⁴ Although this transaction is at issue pursuant to Tabner's 11 U.S.C. § 727(a)(3) cause of action, the actual deeds are not before the court.

filed a certificate of discontinuance.

The Debtor stated that he did not recall taking significant money out of the Partnership and that he may have taken only one draw from the capital account. During the same line of questioning, he said that he did not recall ever taking any money out of the capital account. The Partnership's federal income tax returns for the 1997 through 1999 tax periods report otherwise. The Debtor's 1997 return reports the Debtor's share of income as \$593 and a year end capital account balance of \$277,032; the 1998 return reports income of \$2,663 and a year end capital account balance of \$279,695; and the 1999 return reports income of \$2,768 and a year end capital account balance of \$269,720. (Cr. Ex. 6, 7, and 8.) When asked whether he still held an ownership interest in the Partnership's capital account as of March 26, 2003, the Debtor replied that he did not know.

Schedule B (Personal Property) includes only two entries for household furnishings (Paragraph 4) and wearing apparel (Paragraph 6). All other paragraphs are marked "None," indicating that the Debtor possessed no cash on hand (Paragraph 1), books or pictures (Paragraph 5), jewelry (Paragraph 7), interests in retirement accounts (Paragraph 11), interests in partnerships (Paragraph 12), contingent and unliquidated claims (Paragraph 20), or automobiles (Paragraph 23) as of the date of filing. Although the Debtor appeared at his original and continued § 341 hearings wearing a watch and a wedding ring, he does not include those items in the Petition because he believed that the value of the jewelry did not warrant disclosure on Schedule B. (Tr. 3/26/03 at 77-78.)

The Debtor does not disclose his cash on hand or the existence of a retirement account with Raymond James & Associates that existed during the year prior to the filing of the Petition. (Tr. Stip. paras. 16-17.) Regarding his cash on hand, the Debtor offered conflicting testimony. He initially stated that he had, on the date of filing for bankruptcy relief, personally recorded the Drake Deed and made a cash payment to the Albany County Clerk's office for the requisite fees. He later recanted that testimony by stating that his mother had given him a check.

Contrary to the Debtor's Schedule B, the court admitted into evidence a Retirement Portfolio Report ("Report") for September 28 to October 31, 2001 for "Ralph H. Drake IRA" that had been prepared by

Raymond James & Associates, Inc. (Tr. Ex. F.) The Report shows a portfolio net value of \$431.04. As a basis for non-disclosure, the Debtor testified that he was not made aware of the IRA interest until the week before trial and, in fact, he believed it had been levied and closed by the Internal Revenue Service. The Trustee, however, established that the Debtor received quarterly statements from Raymond James & Associates, Inc. While the Debtor did not recall seeing quarterly statements after receiving a restraining notice from the Internal Revenue Service, he did acknowledge that he provided the Report in evidence to the Trustee.

Finally, with respect to Schedule B, the Debtor does not list any counterclaims or rights to set-off existing at the time of filing. He does reference, under Paragraph 4 (Suits and Administrative Proceedings, Executions, Garnishments and Attachments) of his Statement of Financial Affairs, lawsuits involving Tabner and Cammarota. During direct examination, the Debtor revealed that he has both a countersuit against Tabner and a right of set-off against Cammarota. For purposes of clarification, the Debtor explained that Cammarota held several mortgages against the Debtor and that the Debtor's right of set-off resulted from RHD's construction project known as the Birch Knolls subdivision. The proceeds of the project were apparently earmarked to off-set the secured debt due Cammarota. With respect to the lawsuit initiated by Cammarota, the supreme court's final order was appealed and a Memorandum and Order was issued July 26, 2001 by the Supreme Court of the State of New York, Appellate Division for the Third Department. The Memorandum and Order cited the supreme court's decision as "deficient for its failure to make specific findings as to the amounts owed to defendant under the construction contract," thereby rendering the court unable to "review the correctness of the supreme court's conclusions that the contract was substantially performed and that those amounts fully offset the mortgage debt." (Tr. Ex. D.)

The Debtor states on Schedule I (Current Income of Individual Debtor) that he is an unemployed real estate developer with no monthly income. Supporting this contention, the Statement of Financial Affairs lists income for 1999 in the amount of \$20,000; \$ 15,000 annual income for 2000; and zero for 2001. Similarly,

Schedule J (Current Expenditures of Individual Debtor) reports no monthly expenses and includes only a notation that his wife pays the household expenses. (Cr. Ex. 1; Tr. Ex. A.) Contrary to the Petition, his 2001 federal tax return reports adjusted gross income of \$18,601, including wages of \$10,580, a taxable refund of \$700, IRA distributions of \$7,800, and rental income of \$7,731. (Tr. Ex. K.) Finally, the Debtor indicates on the Statement of Financial Affairs, in response to question 19 (Books, Records, and Financial Statements), that he has not retained any accountants, firms or individuals within six years preceding the bankruptcy filing and that no firms or individuals were in possession of his financial books and records at the time of filing. (Cr. Ex. 1; Tr. Ex. A.) At trial, the Debtor's accountant, Steven J. Lubbe, testified that he has been continuously employed by the Debtor since 1993 or 1994. In that capacity, Mr. Lubbe prepared annual tax returns for both the Debtor individually and the Partnership. Mr. Lubbe further testified that the Debtor provided him with financial records and worksheets during the course of their professional relationship in order to assist him with the preparation of the Debtor's tax returns. Moreover, the Debtor provided Mr. Lubbe with 2001 W-2s and documentation showing rental income and expenses for 2001.

As pertaining to the Trustee's § 727(a)(5) claim, the Debtor testified that he cashed in marketable securities consisting of a United States Savings Bond, IBM stock, General Motors stock, and Niagara Mohawk stock.¹⁵ He averred that the proceeds were used for ordinary living expenses. He also testified that his financial philosophy during 1997-1999 was to "rob Peter to pay Paul and stay alive" (Tr. 2/11/03 at 51), yet he acknowledged that he had only three creditors in excess of \$10,000 as of the date of filing. In addition to the marketable securities, the Debtor testified that he liquidated a Mass Mutual Life Insurance Policy and a North Atlantic Life Insurance Policy with cash surrender values of \$8,000 and \$44,000, respectively. Again, the Debtor offered only that the insurance proceeds were used to pay bills. When asked to verify whether he held "partnership interests and [a] PC interest" totaling \$465,000 as of 1998, the Debtor said,

¹⁵ The Debtor's testimony related to a January 31, 1998 personal financial statement that was introduced as the Trustee's Exhibit L, but withdrawn at trial. Accordingly, the court considers the Debtor's correlative testimony only as it pertains to his credibility.

"That is correct." (Tr. 2/11/03 at 52.) He was unsure, however, of whether those interests referred to his interest in either the 19 Computer Drive property or Woodfield.

With respect to the 19 Computer Drive property, when presented with a June 11, 1999 HUD-1 for the refinance of that property and 3 Drake Court, the Debtor verified that he received net proceeds at closing in the amount of \$ 108,646.13 (the "Refinance Proceeds"). The Debtor testified that the Refinance Proceeds were deposited into Ashland's corporate account and subsequently drawn on to pay bills, but he did not specifically identify any of the payees. An Albank statement showed the deposit on June 16,1999, rendering an ending balance of \$110,636.73. By June 30, 1999, the account held only \$7,778.67. (Tr. Ex. I.)

As an explanation for the non-disclosure of assets and discrepancies between his testimony and the Petition, the Debtor commented that the Petition, as verified, was the result of a "slopp[y], hast[y] job." (Tr. 3/26/03 at 63.) When asked by his counsel to characterize his financial state between January 31,1998 and August 2001, the Debtor replied that it was "a nightmare. Money evaporated." (Tr. 3/26/03 at 75.)

Arguments

The Trustee argues that the Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) because the Debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate, concealed and transferred assets within one year before the date of filing of the Petition. As evidence of the Debtor's fraudulent intent, the Trustee points to the circumstances surrounding the Fuller Road Transfer. In his post-trial memorandum, the Trustee concludes that the Debtor knew of the transfer at the time of filing because he personally recorded the Drake Deed within minutes of the filing of the Petition.

In support of his concealment theory, the Trustee proposes that the Debtor purposely concealed the following assets: his interest and equity in the Residence; Partnership interest; cash on hand; jewelry; retirement account; counterclaims; and 2001 income. As evidence of the Debtor's concealment, the Trustee relies heavily upon: (1) the Debtor's misrepresentations that he owned 3 Drake Court as a tenancy by the entirety and that the property was worth \$26,000 less than the full value tax assessment, thereby reducing

the apparent equity that could be administered by the Trustee for the benefit of the estate; and (2) the Debtor's 2001 federal tax return, reporting various sources of income in stark contrast to Schedule I which lists the Debtor's income as of August 2001 as "zero." (Cr. Ex. 1; Tr. Ex. A.)

Although the Trustee concedes that the Debtor's non-disclosures or inaccurate disclosures may not individually create a presumption of intent, the Trustee suggests that the aggregation of the Debtor's acts supports the conclusion that the Debtor did not dutifully report correct and complete information so as to provide the parties in interest with an opportunity to discern his true financial condition.

As for the Fuller Road Transfer, Tabner similarly believes the Debtor fraudulently transferred the property in violation of 11 U.S.C. § 727(a)(2)(B) since he recorded the Drake Deed within six minutes after the filing of the Petition. Although Tabner emphasizes the time of recording, Tabner does not support its claim with dispositive case law determining whether the date of execution or recording controls for purposes of a § 727(a)(2) analysis. As proof of the Debtor's alleged § 727(a)(2)(A) violation, Tabner relies upon the Sand Creek Road Transfer.

In his post-trial reply memorandum (the "Reply"), the Debtor states that he "inadvertently omitted" his jewelry, interest in the Partnership, and the Fuller Road Transfer from his schedules. (Reply Mem. p. 4.) Speaking to his intent, the Debtor suggests that the court must look to the totality of the circumstances rather than his conduct with respect to each individual asset. As a general defense, the Debtor asserts that the Plaintiffs have not met their burdens of proof relative to their claims under § 727(a)(2). With respect to the Fuller Road and Sand Creek Road Transfers, the Debtor claims that the properties were not property of the bankruptcy estate because they were either transferred outside the one year period prior to bankruptcy or, alternatively, that he held no equity in the properties when transferred, thereby rendering no loss of value to the bankruptcy estate. He further argues that the Plaintiffs have failed to demonstrate that the subject properties were not transferred for fair value. Here, the Debtor relies upon his immediate family members' purportedly valid security interests, which required him to transfer title to the underlying collateral in the

event of nonpayment.

Turning to the Plaintiffs' alternate causes of action pursuant to 11 U.S.C. § 727(a)(3), they contend that the Debtor should be held to a higher level of accountability pursuant to *In re Sethi*, 250 B.R. 831 (Bankr. E.D.N.Y. 2000), because he is an experienced businessman and entrepreneur. The Trustee charges the Debtor with failing to retain any documentation concerning the disposition of life insurance proceeds or the ultimate disposition of the Refinance Proceeds. The Trustee believes that the Debtor's lack of documentation effectively prevents the Trustee from determining whether the bankruptcy estate may have claims against third-parties to recover any sums for the benefit of creditors.

In its post-trial memorandum, Tabner elaborates on the § 727(a)(3) ground for denial of discharge by stating that the Debtor, notwithstanding his education and extensive business experience and financial background, failed to produce any business records, checks, bank statements, tax returns, contracts, notes or mortgages documenting any of his business or personal affairs in order to explain his loss or transfer of assets. Moreover, Tabner asks the court to infer fraudulent intent because the Debtor failed to explain why the assets and transfers were not listed in the Petition.

In his defense, the Debtor challenges the Plaintiffs' claims that the Debtor failed to provide documentation of his financial transactions by summarily declaring that the documents¹⁶ were already in possession of the Trustee. The Debtor further implies that Tabner should have already possessed various financial records and documents because Attorney Tabner served as the Debtor's former counsel for years preceding the bankruptcy filing. Denying that the Debtor's lack of documentation made it impossible to ascertain his financial condition, the Debtor suggests that the records that the Plaintiffs did not have "could have been obtained from banks, debtor's accountant, etc., or from the debtor himself, had a request been made." (Reply Mem. p. 10.) The Debtor states that neither the Trustee nor Tabner requested specific documents, formally through discovery or informally at the § 341 hearings, that were not provided by the

¹⁶ The documents referenced are the Trustee's exhibits.

Debtor or his counsel. As a result, the Debtor argues that the Plaintiffs rely only upon "generic statements that Debtor failed to produce any business records" to bar the Debtor's discharge. (Reply Mem. p. 9.)

However, Tabner asserts that it has shown that the Debtor had assets at one time that are not now available for creditors, thereby establishing a *prima facie* case under § 727(a)(3). Specifically, Tabner points to the Fuller Road and Sand Creek Road Transfers in such close proximity to the entry of Tabner's judgment against the Debtor and the Debtor's filing for bankruptcy relief. In an effort to invalidate those transfers, Tabner cites the lack of consideration evidenced on the face of the respective deeds, as well as the Debtor's failure to include either the indebtedness in his schedules or the transfers on the Statement of Financial Affairs. With respect to the Fuller Road Transfer, Tabner argues that the checks written by Theresa Drake to the Debtor after the date of the Mortgage do not constitute consideration, thereby suggesting that the \$120,000 principal amount of the Mortgage is at least \$31,720 more than the consideration. Tabner urges the court to consider the delay of nearly four years between the earliest check in March 1, 1996 and the execution of the Mortgage on February 11, 2000 as an indication that the funds were periodic gifts rather than loans intended to be secured by the Mortgage. As for the Sand Creek Road Transfer, Tabner faults the Debtor for his failure to produce business records substantiating the alleged foreclosure by Union National Bank, the amount owed Union National Bank, the amount of the Goodwin's loan to the Debtor, the amount of the Goodwin's subsequent mortgage on the property, or the value of the property at the time of transfer.

Tabner also argues that the Debtor should be denied a discharge for failing to list or adequately explain his interest in the Partnership, his retirement account, or cash on hand. With equal compulsion, Tabner justifies its § 727(a)(3) claim by reference to the Debtor's deposit of the Refinance Proceeds from his individually owned properties into Ashland's corporate account without receipt of a promissory note. At issue is the propriety of the Debtor's explanation for the disposition of the funds.

In support of relief pursuant to 11 U.S.C. § 727(a)(4), the Trustee argues that the Debtor's testimony confirmed that the Debtor acted with reckless disregard for the truth because he knew or should have known

that the Petition was untruthful and inaccurate at the time of filing. The Trustee concludes that "a review of Debtor's Petition and the evidence establishes for the court a flippant, teeth pulling impression of the Debtor." (Trustee's Mem. p. 14.) Despite the Debtor's acknowledgment during trial of his numerous undisclosed assets and hastily prepared Petition, the Trustee emphasizes that the Debtor never filed amended schedules or statements to correct the inadequacies and provide the parties with a complete and accurate accounting of his assets and liabilities. Moreover, the Trustee suggests that the Debtor exhibits a pattern of transferring and diverting assets to family members even when in the midst of a "financial nightmare" where money was "evaporating" at the expense of the Debtor's legitimate creditors. To satisfy the requirement of fraudulent intent, the Trustee looks to the Debtor's receipt of benefits from his false statements, including the retention of the beneficial use of property held by family members and his wife's corporation.

Tabner also submits that the Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(4)(A) because the Debtor has not proven that his omissions were unintentional misrepresentations, and he has not given a credible explanation for his failure to do so. Tabner cites *Gollomp*, 198 B.R. 433 (Bankr. S.D.N.Y. 1996) and *Raymonda*, Case No. 99-13523, Adv. Pro. No. 99-91199 (Bankr. N.D.N.Y. February 9, 2001), and argues that the Debtor's unlisted assets meet the requisite elements of fraud and they relate materially to the Debtor's bankruptcy case. Specifically, Tabner infers from the lapse of time between execution and recording of the Drake Deed that the Debtor retained the use and benefit of apparent ownership in the Fuller Road property. Considering the Debtor's knowledge and sophistication of real estate transactions, Tabner suggests the Debtor knew that title would not transfer until the Drake Deed had been recorded and, based upon that knowledge, may not have recorded the Deed at all if he had not been forced to file bankruptcy. Tabner's argument regarding the Sand Creek Road Transfer is similar: based upon the Debtor's explanation that the Goodwin Deed was executed more than one year prior to the date of filing for bankruptcy, Tabner presumes the Debtor knew that a transfer of property to family members without fair consideration within one year of filing was improper.

At the crux of Tabner's § 724(a)(4)(A) argument seems to be the fact that Tabner, rather than the Debtor, provided documentation to the Trustee revealing the existence of several of the assets omitted in the the Petition. As a result of discovery conducted during Tabner's underlying state court action, Tabner provided the Trustee with information concerning the property transfers to the Debtor's immediate family members and the existence of the Debtor's interest in the Partnership and capital account. The Debtor relies upon this same proposition to show that he did not have the requisite fraudulent intent because most of the assets omitted from the Petition were known to the judgment creditor as a result of Tabner's pre-bankruptcy lawsuit.

As a fourth and final cause of action, the Trustee argues that the Debtor should be denied a discharge pursuant to 11 U.S.C. § 727(a)(5) because the Debtor failed to provide sufficient evidence to satisfactorily explain the loss of assets, including the 1999 Refinance Proceeds that were deposited into Ashland's corporate account. The Trustee deems the Debtor's explanation that "he was [robbing] Peter to pay Paul" to be insufficient without documentation showing "who received what money for which purpose." (Tr. Mem. p. 16.) In his defense, the Debtor faults the Trustee for failing to meet his burden of identifying the assets at issue and questions the Trustee's reliance upon an incomplete financial statement that was introduced and subsequently withdrawn following an objection by the Debtor's counsel. Relying upon *In re Bodenstein*, 168 B.R. 23 (Bankr. E.D.N.Y. 1994), the Debtor argues he has no obligation to corroborate his testimony. Furthermore, the Debtor contends his testimony is aptly supported by the fact that he owed money to the IRS, the New York State Tax Division, and the foreclosing financial institution at the time of filing. Arguably, the Debtor suggests he would have halted the pressing foreclosure proceeding and avoided bankruptcy altogether if he had possessed the financial means to do so.

Discussion

1. Admissibility of People v. Drake

As previously discussed, Tabner's counsel introduced *People v. Drake* during direct examination

of the Debtor. The following colloquy ensued:

- A: No, sir.
Q: Were you ever involved in a criminal trial before Judge Clyne in Albany County Court?
A: Yes, sir.
Q: What was ... the outcome of that trial?
A: Judge Clyne dismissed it. He overturned a verdict of a jury.
Q: Did Judge Clyne do that?
A: Yes, Judge Clyne.
Q: Would it help your recollection if I pointed out to you that you were convicted of Grand Larceny in the Third Degree in Judge Clyne's court as that was appealed?

(Tr. 2/11/03 at 152-153.) The Debtor's counsel objected to the above line of questioning on the basis that Tabner's counsel had not laid the proper foundation. In response, Tabner's counsel indicated that he was "looking to impeach [the Debtor]" (Tr. 2/11/03 at 153) and that the Debtor's testimony regarding the criminal proceeding spoke directly to the Debtor's credibility.¹⁷ As requested by Tabner and upon consent of the Debtor, the court takes judicial notice of the official Appellate Division Reports pursuant to Fed. R. Evid. 201. Having reserved its decision at trial, the court must now determine whether the Debtor's criminal history and correlative testimony are admissible in this bankruptcy proceeding.

The procedural history of *People v. Drake* reveals that the Debtor was initially convicted of grand larceny in the third degree, which was later modified and affirmed by the court of appeals.¹⁸ As discussed during trial, the court of appeals, however, determined that a lengthy sentencing delay was unreasonable and that unless excused it resulted in a loss of jurisdiction requiring dismissal of the indictment.

The parties disagree as to the applicable Federal Rules of Evidence. While the Debtor cites Fed. R. Evid. 404 and 609 as a basis for excluding the Debtor's testimony, Tabner cites Fed. R. Evid. 405 and 613

¹⁷The court recognizes that Tabner's counsel indirectly addressed the criminal proceeding when he first questioned the Debtor about the circumstances of his suspension from New York State. At that time, Tabner's counsel advised that the Debtor's testimony was relevant because it related to the Debtor's background, education, and sophistication.

¹⁸*See supra* note 7.

as the countervailing authority for admissibility. Based upon their post-trial submissions, however, the court determines that the relevant inquiry lies in Fed. R. Evid. 404, 608(b), and 403.

In its post-trial memorandum, Tabner opens by stating, "Debtor goes to great lengths to create an evidentiary issue concerning conviction of a crime, when the issue is the Debtor's candor and truthfulness. Rule 609 only becomes applicable if conviction of a crime is in issue." (Pl. Mem. 6/6/03 p. 3.) Because the court finds that the indictment was ultimately dismissed by the Albany County Court (Harris, J.), *see Drake v. State of New York*, 126 Misc. 2d 309, 310 (N.Y. Ct. Cl. 1984),¹⁹ the court agrees with Tabner; Fed. R. Evid. 609 is inapplicable to the case at bar.

Alternatively, Tabner relies upon Fed. R. Evid. 405 to introduce the criminal proceeding as a specific instance of Debtor's past acts which establish character traits that are essential elements of the Plaintiffs' bankruptcy causes of action. Specifically, Tabner alleges "the facts set forth in the two appellate cases are proof of specific instances indicating Debtor's willingness to obtain money wrongfully by false pretenses." (Pl. Mem. 6/6/03 p. 6.) Fed. R. 405(b) provides that specific instances of conduct are admissible "in cases in which character or a trait of character of a person is an essential element of the charge." Fed. R. Evid. 405(b). However, this rule deals only with the allowable methods of proving character once the admissibility of character evidence is proven under Fed. R. Evid. 404. Although Tabner's stated purpose at trial for introducing the criminal proceeding was to erode the Debtor's credibility, it appears from the post-trial submissions that Tabner's true intent was to show that the Debtor's alleged fraudulent conduct surrounding his bankruptcy filing was consistent with his perceived dishonest character. The latter is specifically prohibited by Fed. R. Evid. 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b).

In challenging the Debtor's credibility, Tabner is bound by Fed. R. Evid. 404 (a sub-part of which

¹⁹ Following the dismissal of the indictment, the Debtor brought a claim against the State of New York for malicious prosecution, negligent investigation, and deprivation of civil rights. The court of claims held that Debtor's allegations did not properly state a cause of action and dismissed the claim.

specifically references Fed. R. Evid. 608). Generally, "specific instances of the conduct of a witness, for purposes of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence." Fed. R. Evid. 608. It is well established that circumstantial use of character evidence is not permitted in bankruptcy proceedings or other civil cases except to impeach or support the character of a witness for truthfulness as provided in Fed. R. Evid. 607,608, and 609. *See* Hon. Barry Russell, Bankruptcy Evidence Manual § 613.1 (2004). Although the court finds that the Debtor's prior act of falsifying a time card and, thereby, receiving money wrongfully is probative of the Debtor's veracity, this does not end the inquiry. The court must look to Fed. R. Evid. 403 to ensure that the probative value is not outweighed by the risks of unfair prejudice, and/or confusion of issues, and does not constitute a needless presentation of cumulative evidence. The Debtor's prior act occurred approximately twenty years prior to his bankruptcy filing. This provides little, if any, probative value to the underlying bankruptcy causes of action. Moreover, only two of the four causes of action seeking to deny the Debtor's discharge are dependent upon whether the Debtor's pre- and post-bankruptcy conduct constitutes fraudulent behavior. Finally, based upon the evidence presented by Tabner and the Trustee, the court is able to render its decision without consideration of the Debtor's prior criminal proceedings.

The court must also address counsel's initial statement that he sought to introduce the criminal proceedings for impeachment value only. In its post-trial memorandum, Tabner states it was "appropriate under [Fed. R. Evid.] 613(b) for Plaintiffs to refer to the two appellate cases to establish the inconsistency between Debtor's earlier testimony concerning his suspension and the actual reason for his suspension." (PI. Mem. p. 5.) As discussed *infra*, the record does not support Tabner's contention that the Debtor ever made a prior inconsistent statement. Throughout the trial, the Debtor rarely offered a definitive answer to questions regarding his employment with New York State, and his testimony on that subject often times bordered on incoherent. The Debtor was cautious, however, to avoid direct contradiction of his initial testimony. The court does not find proper grounds for impeachment because: (1) the Debtor's testimony is

unclear regarding his suspension from New York State; and (2) the Debtor unequivocally answered that he was not convicted of a crime. When the Debtor answered that he was not convicted of a crime, counsel's inquiry should have ceased. The Debtor's testimony was insufficient to trigger Fed. R. Bankr. P. 613(b). Accordingly, the court declines to consider the Debtor's testimony as it relates to his entitlement to discharge.

//. Objections to Discharge

As this court recognized, the denial of a discharge equates to the "death penalty of bankruptcy," *Raymonda, supra*, at 4; nonetheless, the court concludes that the denial of the Debtor's discharge is warranted in this case. The un rebutted factual allegations raised in these adversary proceedings allude at the outset to a disingenuous, if not dishonest, Debtor. While the statutory right to discharge must be construed liberally in favor of the Debtor, *In re Arcuri*, 116 B.R. 873, 878 (Bankr. S.D.N.Y. 1990), the purpose of 11 U.S.C. § 727 is to make certain that those who seek bankruptcy protection do not play "fast and loose with their assets or with the reality of their affairs." *Id.* (quoting *In re Tully*, 818 F.2d 106, 110(1st Cir. 1987)). In this case, the evidence shows that the Debtor, at best, has taken the "fast and loose" approach with respect to both assets and his overall financial state.

Procedurally, the court applies the preponderance of evidence standard set forth in *Grogan v. Garner*, 498 U.S. 279, 287 (1991), with respect to objections to discharge pursuant to 11 U.S.C. § 727. *In re Bodenstein*, 168 B.R. at 28. Plaintiffs must bear the ultimate burden of persuasion regarding the essential elements of the alleged objections to discharge. *Id.* However, "once sufficient evidence is presented by the plaintiff[s] to satisfy the burden of going forward with evidence, the burden thereafter shifts to the debtor to provide evidence to rebut the plaintiffs'] *prima facie* case." *Id.*

A. 11 U.S.C. § 727(a)(2)

Bankruptcy Code § 727(a)(2) provides for the denial of a discharge if:

[T]he debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed,

mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -

- (A) property of the debtor, within one year before the date of filing of the petition; or
- (B) property of the estate, after the date of filing or the petition.

Plaintiffs' § 727(a)(2) claims rest on the Debtor's undisputed transfers of real property and his alleged concealment of assets. First, Plaintiffs believe that the Debtor transferred property with the actual intent to hinder, delay, or defraud a creditor or an officer of the estate. Specifically at issue are the Debtor's Fuller Road and Sand Creek Road Transfers.²⁰ Second, the Trustee adds that the Debtor intentionally shielded assets from the purview of the Trustee and his creditors when he filed for bankruptcy relief in order to prevent those assets from being administered for the benefit of the estate. Notwithstanding that the transfers or the alleged concealment, if committed with the requisite fraudulent intent, would alone suffice to bar the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2), the court will address the parties' allegations in their entirety.

1. *The Fuller Road Transfer*

Although it may appear somewhat technical, the Fuller Road Transfer falls within the ambit of § 727(a)(2)(B) as a post-petition transfer because the Drake Deed was *recorded* after the Petition was filed. *See In re Rubin*, 12 B.R. 436,439 (Bankr. S.D.N.Y. 1981)(the date of recording constitutes the date when the property is "transferred" within the meaning of Bankruptcy Code § 727(a)(2)).

Because the Debtor does not dispute that he executed and personally recorded the Drake Deed within the statutory one year period, the determinative question for the court is whether he possessed the necessary fraudulent intent with respect to the transfer. Since the Debtor is unlikely to admit that he acted fraudulently, fraudulent intent may be inferred from the facts and circumstances of the case. *In re Gollump*, 198 B.R. at 440. In order to discern the Debtor's true intent, the court may look to whether the following "badges of

²⁰ Plaintiffs' amended complaints objecting to discharge include the Debtor's transfer of the Fuller Road property to his mother as a basis for their § 727(a)(2) causes of action. Tabner's amended complaint also includes the Debtor's transfer of the Sand Creek Road property to the Goodwins, in their individual capacities, in support of its § 727(a)(2)(A) cause of action.

fraud" are present:

- (1) lack or inadequacy of consideration;
- (2) a family, friendship or close associate relationship between the parties;
- (3) the retention of position, benefit or use of the property in question;
- (4) the financial condition of the party sought to be charged both before and after the transaction in question;
- (5) the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and
- (6) the general chronology of the events and transactions under inquiry.

Id. In attempting to meet their burdens, Plaintiffs establish that most, if not all, of the "badges" exist with respect to this transfer: the Debtor fails to include this transfer in the Petition; the property was transferred to his mother; he could not clearly articulate the consideration for the Mortgage or recall the exact amount borrowed from his mother prior to his execution of the Mortgage (Tr. 2/11/03 at 115, 116); several of the checks from Theresa Drake to the Debtor post-dated the Mortgage; and he was compelled by moral obligation to complete the transfer (Tr. 2/11/03 aLL14). Tabner also establishes that the Debtor transferred the property to his mother eight months after entry of Tabner's judgment. (Tr. 2/11/03 at 126.)

The Debtor's testimony that he personally recorded the Drake Deed "right around the same time" that the Petition was filed (Tr. 2/11/03 at 122) is particularly telling as to his intent. Although he testified that he was unaware as to whether the Petition had been filed at the time of recording (Tr. 2/11/03 at 123), his earlier testimony regarding the urgency of his bankruptcy filing suggests that he knew that the Petition would be filed without hesitation by counsel's office. Moreover, the Debtor and his counsel acknowledged that counsel did not even have an opportunity to review the Petition before it was delivered to the Bankruptcy Court Clerk's office.²¹

As for the Debtor's post-trial explanation that he "inadvertently omitted" this transfer from the Petition, the court cannot overlook the fact that the Debtor brought the completed Petition to counsel's office on the same day that he personally delivered the Drake Deed to the Albany County Clerk's office for

²¹ See *supra* note 4.

recording. It is difficult to accept that the Debtor inadvertently failed to disclose this transfer, yet he remembered to promptly attend to the filing of the Drake Deed that had been executed but unrecorded several months beforehand.

Based on the Debtor's testimony and the documents in evidence relating to the Fuller Road Transfer, the court concludes that the Debtor's actions violated § 727(a)(2)(B).

2. *The Sand Creek Road Transfer*

The court is also persuaded that the Sand Creek Road Transfer violates 11 U.S.C. § 727(a)(2)(A). Because the Goodwin Deed was recorded on August 14, 2000, the transfer is deemed to have occurred within one year of the Debtor's bankruptcy filing on August 3, 2001. The court, therefore, discredits the Debtor's argument that the transfer occurred beyond the look-back period of § 727(a)(2)(A) because the Goodwin Deed was executed more than one year prior to his bankruptcy filing. *See In re Rubin*, 12 B.R. at 439.

As with the Fuller Road Transfer, the "badges of fraud" envelop this transaction. The Debtor admittedly transferred this property, after approximately eight years of sole ownership, to his sister and brother-in-law in the midst of his financial "nightmare." The recorded Goodwin Deed reports that the Debtor did not pay transfer tax to Albany County, thereby indicating that no consideration was given for the transfer. Furthermore, although the Debtor transferred the property in August 2000, his 2001 federal income tax return reported rental income from the property totaling \$8,333. (Tr. Ex. K.) The Debtor's receipt of rental income begs the question as to why the Debtor would be entitled to declare rental income for real property that he no longer owned.

Although the Debtor testified that the property was foreclosed by Union National Bank ("UNB") in 1993 or 1994 (Tr. 2/11/03 at 105) and, at that time, the Goodwins advanced the funding to terminate that foreclosure proceeding in exchange for a privately held mortgage, the Debtor could not recall the date of execution of the Goodwins' mortgage, the amount of the mortgage, or whether it was ever even recorded (Tr. 2/11/03 at 106). Although the Debtor testified that he was represented by an attorney with respect to the

Goodwins' foreclosure suit, he did not produce a note and mortgage, demand letter, or foreclosure documents pertaining to the Goodwins' interest in the property. Additionally, he did not produce evidence of UNB's initial mortgage or satisfaction of that mortgage.

Based upon the foregoing, the court concludes that the Debtor transferred the property with the intent to hinder, delay or defraud his creditors. Thus, Tabner's § 727(a)(2)(A) claim is hereby sustained.

3. *Concealment of Assets*

Notwithstanding that the real property transfers alone suffice to bar the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2), the court also considers the Trustee's allegations that the Debtor intentionally shielded assets from the purview of the Trustee and his creditors when he filed for bankruptcy relief. The Trustee alleges that the Debtor purposefully concealed property with the intent to hinder the Trustee's administration of the estate. In support of this argument, the Trustee references the Debtor's misrepresentation of his ownership interest and equity in his residence, as well as numerous omissions from the Petition.

Throughout the proceedings and at trial, the Debtor admitted that he failed to disclose several assets (Tr. 3/26/03 at 84), including a wedding ring, watch, cash on hand, IRA, fifty percent ownership interest in the Partnership, and counterclaims or rights of set-off against third parties. The Debtor does not dispute that he failed to disclose these assets, but he denies that the non-disclosure constitutes fraudulent concealment.

When asked to explain why he incorrectly listed his ownership interest in the Residence, his testimony was that he "honestly thought [that his] wife owned a part of [3 Drake Court]." (Tr. 3/26/03 at 83.) He further testified that he discovered his fee simple interest while reviewing the Drake Deed in preparation for the trial. The Debtor offers no explanation for how he derived the Schedule A value.

The Trustee's contention that the Debtor fraudulently concealed a one-half interest in the Residence is unsupported by the Debtor's uncontradicted testimony that he believed he and his wife jointly owned the Residence as tenants by the entirety. This explanation is certainly plausible considering that the Residence

is their marital home. Additionally, the Trustee's belief that the Debtor concealed his 100% ownership interest and non-exempt equity to prevent it from being administered as an asset of the estate is unsupported by Schedule C (Property Claimed as Exempt) since the Debtor did not include a household exemption pursuant to N.Y. CPLR § 5206(a).

Turning to the other non-disclosed assets, the court declines to accept the Debtor's testimony that he believed the IRA account was levied by the Internal Revenue Service because he received and declared IRA distributions of \$7,800 in 2001 (Tr. Ex. K), which are also undisclosed on his schedules. As for his Partnership interest, it is equally unconvincing that the Debtor did not intend to conceal this asset when he was dishonest about receipt of withdrawals from the Partnership's capital account.

In his post-trial memorandum, the Debtor argues that he could not have intentionally concealed several of the subject assets because he had already disclosed them to Tabner in a pre-bankruptcy deposition. Similarly, the Debtor states that he did not intentionally fail to disclose his jewelry because he wore the items to his § 341 meetings. The Debtor justifies this omission due to the jewelry's nominal value. This attempted justification must fail; it is not within the Debtor's discretion to determine which assets may or may not be of value to the bankruptcy estate. Such is the role of the case trustee. The court is also particularly disturbed by the Debtor's rationale that the interested parties could have independently obtained the Debtor's financial information from sources other than the Debtor. The Debtor's right to discharge is premised upon the Debtor's honest portrayal of his financial assets and liabilities pursuant to 11 U.S.C. § 541. In this case, the Debtor makes no attempt to fully and accurately report his financial condition, as evidenced by his continued failure to file amended schedules and statements. Moreover, review of the Petition alone shows that the Debtor did not overlook a question or series of questions; rather, the Petition is silent on its face as to the Debtor's ownership of the majority of his assets.

As referenced during cross-examination, the court also considers the Debtor's attempt, albeit unsuccessful, to file and proceed in a Chapter 13 case as it relates to the question of fraudulent intent at the

time of filing. There is no question that the Debtor intended to reorganize his debts rather than file for straight bankruptcy. However, the Debtor was still required to file complete and accurate schedules so as to apprise his creditors and the Chapter 13 trustee of his true financial status. The procedural history of this case, therefore, does not negate the overwhelming inference of fraud on the part of the Debtor.

The court's determination that the Debtor fraudulently concealed assets within one year of his bankruptcy filing serves only to lend support to the court's prior conclusion that the Debtor shall be denied a discharge pursuant to § 727(a)(2)(A) and (B).

B. 11 U.S.C. § 727(a)(3)

Bankruptcy Code § 727(a)(3) provides for a denial of discharge if:

[T]he debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

In order for the Plaintiffs to prevail under § 727(a)(3), they must prove by a preponderance of evidence that the Debtor unjustifiably failed to keep records which would allow them to ascertain his financial condition and material business transactions. *See In re Sethi*, 250 B.R. 831,838 (Bankr. E.D.N.Y. 2000). In this case, the Plaintiffs face a practical problem that prevents the granting of their § 727(a)(3) claims - with the exception of the Trustee's information request at the original § 341 meeting - the Plaintiffs never requested that the Debtor provide any records. In response to the Trustee's sole request, the Debtor produced his 2001 income tax return for the Partnership. (Def. Ex. 1.) Beyond that request, the Plaintiffs conducted no discovery in this case.²² Consequently, they have not shown that the Debtor was ever required to produce any additional documentation. Unlike the Plaintiffs' § 727(a)(2) causes of action, the burden in this instance never shifted to the Debtor to furnish documentation relating to his financial condition. Because

²² The record reflects that the Plaintiffs did not invoke their rights to discovery pursuant to either Fed. R. Bankr. P. 2004 or Fed. R. Bankr. P. 7034. Plaintiffs, however, provide no insight concerning whether their failure to request financial records and/or other documentation was attributable to tactical oversight or error.

the court concludes that it is insufficient for the Plaintiffs to introduce and rely upon incomplete financial records obtained during Tabner's state court lawsuit in order to show that pieces of the Debtor's financial puzzle were missing at the time he filed bankruptcy, the Plaintiffs' § 727(a)(3) claims are denied.

C. 11 U.S.C. § 727(a)(4)

Bankruptcy Code § 727(a)(4) provides in part that a debtor shall be denied a discharge if:

[T]he debtor knowingly and fraudulently, in or in connection with the case -
(A) made a false oath or account.

In order to deny a debtor's discharge pursuant to this section, the objecting party must establish the following elements: (1) the debtor made a statement under oath; (2) such statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *In re Frommann*, 153 B.R. 113, 118 (Bankr. E.D.N.Y. 1993). False statements or omissions on the face of a debtor's petition are said to constitute a false oath sufficient to satisfy the first and second elements of the five prong test. *Id.* at 118-119 (citing *In re Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992)). As for the fourth element, since "[fraudulent intent is rarely susceptible to direct proof," *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983), the court may infer fraudulent intent from a debtor's "reckless indifference to or cavalier disregard for the truth." *In re Arcuri*, 116 B.R. 873, 883 (Bankr. S.D.N.Y. 1990). Turning to the fifth element, the requirement of materiality is satisfied if the debtor's false oath is "pertinent to the discovery of assets." *In re Murray*, 249 B.R. 223, 230 (E.D.N.Y. 2000); *In re Brenes*, 261 B.R. 322, 334 (Bankr. D. Conn. 2001).

The amended complaints allege that the Debtor failed to list certain assets in the Petition and that such omissions constitute a false oath under 11 U.S.C. § 727(a)(4)(A). The Debtor allegedly omitted the following assets from the Petition: (1) his ownership interest in the Fuller Road property, which was not relinquished until after the Petition was filed; (2) his 50% ownership interest in the Partnership; (3) the Raymond James & Associates retirement account; (4) cash on hand; (5) books or pictures; (6) jewelry; (7) a counterclaim against Tabner; (8) a legal claim against Cammarota; (9) charitable gifts given in 2001; (10)

the possession of financial data by the Debtor's accountant; (11) outstanding mortgages held by Cammarota; and (12) his interest in the Sand Creek Road property.²³ The Trustee's complaint also alleges that the Debtor incorrectly stated his income to be zero at the time of filing.²⁴

The Debtor does not dispute that he made several false statements. Rather, he asserts as a blanket defense to the Plaintiffs' §§ 727(a)(2) and (a)(4) claims that they collectively fail to show that he acted with any "actual intent" to defraud parties in interest. (Reply p. 32.) The Debtor further states that he attempted to properly complete the Petition and attributes the omissions to the conditions under which he prepared the Petition. However, this proclamation that he attempted to properly complete the Petition is compromised by the fact that the number of omissions and untruths outweigh the number of accurate disclosures.

Moreover, the court recognizes that the inquiry is not limited to the Debtor's actual intent. In that vein, it is enough for the Debtor to have acted with a reckless or cavalier disregard for the truth. *In re Scott*, 233 B.R. 32,44 (Bankr. N.D.N.Y. 1998) (citing *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)); *See also In re Dubrowsky*, 244 B.R. 560,575 (E.D.N.Y. 2000) (the gross discrepancy of the debtor's household goods estimates, the omission of jointly owned property, and the debtor's failure to include an anticipated post-bankruptcy increase in salary evidenced a reckless disregard for the truth). In this case, based upon the Debtor's general demeanor and credibility, the court finds reckless disregard for the truth as opposed to honest mistake or mere inadvertence.

Despite the Debtor's repeated explanation that the Petition was prepared in haste, the Debtor never endeavored to amend the Petition in order to correct the deficiencies that arose as a result of the Trustee's investigation and subsequent commencement of the underlying adversary proceeding. Rather, the Debtor

²³ The Trustee's complaint included omissions 1 through 10. Tabner's complaint included omissions 2, 7, 8, 11, and 12.

²⁴ Although the Trustee references the Debtor's incorrect statement as to his ownership interest in the Residence, the Trustee does not specify whether this misrepresentation also constitutes a false oath in support of the Trustee's § 727(a)(4) claim. Because the court will not speculate as to the Trustee's intent, the court will not address this allegation as it relates to § 727(a)(4).

repeatedly infers that he has no obligation to disclose the "technical items that should have been listed," because they were "already known to the creditors." (Reply p. 32.) This statement openly defies the Debtor's fundamental duty pursuant to 11 U.S.C. § 521 to file a complete list of creditors and a schedule of assets and liabilities. Moreover, the possession of documents pertinent to a debtor's financial condition by his or her former attorney is of little consequence since it is the debtor who ultimately bears the burden of financial disclosure. *See In re Sethi*, 250 B.R. at 841 (discrediting the debtor's § 727(a)(3) defense that his former attorney possessed all relevant documents in connection with a pre-petition real estate sale).

Finally, the Debtor's falsehoods continued during his testimony at trial. Although the Debtor admitted to the withdrawal of funds from the Partnership's capital account as recently as 1999 and acknowledged that the Partnership has not filed a certificate of discontinuance, the Debtor still claimed that he did not have an interest in the Partnership on the date of his bankruptcy filing. (Tr. 3/26/03 at 62.)

For the above reasons, the court sustains the Plaintiffs' § 727(a)(4) objection to discharge.

D. 11 U.S.C. § 727(a)(5)

Bankruptcy Code section 727(a)(5) provides for the denial of discharge if:

[T]he debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

In order to show that the Debtor had a substantial asset structure prior to the filing of the Petition, the Trustee relies upon the introduction of a 1998 personal financial statement (the "Statement") and the Debtor's receipt of the Refinance Proceeds totaling \$108,000. As a basis for depletion of those assets, the Trustee points to the Debtor's testimony concerning the Statement and the Debtor's admitted deposit of the Refinance Proceeds into Ashland's account. The Trustee claims that the Debtor failed to explain the alleged loss of assets because he "submitted no checks, invoices, statements, accountings, or other documents to show who received what money for what purpose." (Tr. Mem. P. 16.)

The court is unconvinced that the burden shifted to the Debtor in this instance. The burden would

not shift to the Debtor to explain the loss or deficiency of assets unless and until the Trustee demonstrated that the Debtor did not have or was unable to account for assets which he previously owned. *See In re Halperin*, 215 B.R. 321, 332 (Bankr. E.D.N.Y 1997). In this case, the Trustee is unable to show a loss of assets because of the following: (1) the Statement is incomplete and does not allow the Trustee to identify the liquidated marketable securities, thereby rendering it impossible for the Debtor to provide any explanation with respect to the contents of the Statement or his phantom net worth; and (2) it is unknown whether the 1999 Refinance Proceeds constitute an asset of the estate or a pre-petition secured debt.

Furthermore, even if the court were to determine that the burden shifted to the Debtor to explain the disappearance of the Refinance Proceeds, the Debtor's uncontroverted testimony was that he ultimately disbursed the Refinance Proceeds from the Ashland account to pay his creditors. The court is not at liberty to explore the merit of the Debtor's explanation or propriety of the dissipation of funds since the Debtor is required to show only that he has not hidden or shielded assets. *See In re Bodenstein*, 168 B.R. at 33.

For the foregoing reasons, the Trustee's 11 U.S.C. § 727(a)(5) claim must fail.

Conclusion

Based upon the pleadings and the evidence adduced at trial, the Debtor's discharge is denied pursuant to 11 U.S.C. §§ 7247(a)(2)(A), (a)(2)(B) and (a)(4)(A). Alternatively, for the above reasons, the Plaintiff's objections to the Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(3) and (a)(5) are denied.

It is so ORDERED.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge